In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1306

WILLIAM V. HELD, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is not yet officially reported. The opinion of the district court (Pet. App. 8a–16a) is reported at 315 F. Supp. 352.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1970 (Pet. App. 1a). On February 4, 1971, petitioner's application for recall and stay of mandate was denied by Mr. Justice Stewart. The petition for a writ of certiorari was filed on February 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether a person in effective control of a corporation and having custody of corporate records may refuse to comply with an Internal Revenue summons calling for the production of the records on the ground that he is not formally designated in the summons as an officer of the corporation.

2. Whether the evidence was sufficient to support the district court's finding that petitioner was able to produce at least some of the corporate records named in the Internal Revenue summons.

3. Whether, prior to appearing in response to a summons to produce corporate records and give oral testimony, the witness may invoke the Fifth Amendment privilege against self-incrimination.

STATEMENT

The district court, on application of the United States, enforced an Internal Revenue summons which, as found by the district court (Pet. App. 10a), was issued to and served upon petitioner "as custodian of the books and records of the 16 defendant corporations" whose records were requested in the summons. The underlying tax investigation began as a routine audit by a revenue agent of petitioner's personal tax return of 1964 and the 1967 return of Wilmart Associates, Inc., a corporation of which petitioner was a principal (Pet. App. 9a). During the course of the investigation, which included examination of various bank accounts and fragmentary corporate records in the possession of various accountants, it became apparent that petitioner controlled some 80 bank ac-

counts of the 16 corporations and that, although petitioner was not formally designated as an officer of any of the corporations, he was in effective control of them (Pet. App. 2a–3a, 9a–10a). Accordingly, in 1969 a special agent issued the instant summons.

At the enforcement proceedings in the district court, an accountant testified that petitioner engaged him in 1967 to do audit work and that he thereafter prepared tax returns for petitioner and ten of the corporations here involved (Hearing Transcript for March 13, 1970, pp. 206–208, 250).[1] The same accountant also stated on deposition that petitioner put up the capital for some of the corporations and controlled them "financially" and "generally speaking" (deposition of Melvin Young, January 19, 1970, pp. 26–29). Another accountant employed by petitioner had been told by him that he, petitioner, was the "general manager" of the corporations and had the final "say-so" on corporate matters (deposition of James T. Finney, January 19, 1970, pp. 3, 15, 47, 61, 63).

While the enforcement proceedings were pending, petitioner, without notice to the district court or the United States, consummated a sale of the stock, previously owned or controlled by petitioner, of five of the corporations. While many of the records relating to these corporations were transferred as part of the

[1] By order of the court of appeals, this case was appealed, briefed, and argued on the original record and there is no printed record or appendix. All record references herein are to the original transcript of hearings or depositions.

sale,[3] certain pertinent records of these and other corporations, including pre-1967 records, remained in the control of petitioner or his accountant (Hearing Transcript for September 3, 1970, pp. 53–56, 59, 68, 70–77).

The court of appeals affirmed the district court's enforcement of the summons (Pet. App. 1a–8a), stating (Pet. App. 6a):

> The Government does not undertake to label the relationship of Held to the corporations, presumably because the investigation revealed Held to be in control of the corporations without occupying an official position. We hold that a taxpayer who is in control of a corporation cannot shield himself from a Sec. 7602 summons by refusing to accept an official position with the corporation.

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 10–14) that the Internal Revenue summons for corporate records was wholly invalid because it was addressed to petitioner without naming him as an officer of the corporation. Petitioner's *de facto* position as the person in effective control of the corporations (excepting, of course, the five corporations sold during the enforcement litigation) is clearly established by the voluminous depositions which were taken and by the full evidentiary hearings which were held. As the district court observed (Pet. App. 12a), petitioner did not testify and introduced no evidence to support

[3] Depositions of James DeMatteo, September 2, 1970, pp. 5–7, John J. Speed, August 20, 1970, pp. 13–15, 40, and Special Agent Joe M. Wilson, August 21, 1970, pp. 11, 60–61.

his contention that he was not the authorized custodian and did not have power to produce at least some of the records involved.

Contrary to petitioner's assertion (Pet. 12–13), there is no conflict with the Seventh Circuit's decision in *Brussel* v. *United States*, No. 17990, C.A. 7, decided November 4, 1970. In that case, a civil contempt order was reversed for failure of proof that a defaulting witness was a corporate officer who could produce certain subpoenaed corporate records. In this case, there was a specific finding that petitioner had custody or control of the requested records. In these circumstances, it was not necessary for the government to allege or prove that petitioner held any specific offices with the corporations involved.

2. The record established, contrary to petitioner's contention (Pet. 14–18), that petitioner had the ability to comply with the order enforcing the summons. The evidence summarized above, including that relating to the recent sale by petitioner of five corporations, makes clear that petitioner was, when served with the summons, able to produce many of the records called for in the summons.

3. Finally, as also noted by the court below (Pet. App. 6a–7a), petitioner cannot resist enforcement of the summons on Fifth Amendment grounds. It is well settled that a custodian of corporate records may not refuse to comply with a summons on the ground that the records would incriminate him. See *United States* v. *Kordel*, 397 U.S. 1, 7. And any personal Fifth Amendment claims which might excuse petitioner from answering specific questions may be raised before

the special agent to whom the summons is returnable, but the witness' anticipation of such claims does not excuse him from otherwise complying with a valid summons. Cf. *Communist Party* v. *United States*, 367 U.S. 1, 106–110.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General,
FRED B. UGAST,
Acting Assistant Attorney General.
MEYER ROTHWACKS,
JOHN P. BURKE,
Attorneys.

MARCH 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971